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CONFESSION : MEANING OF

By

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Stephen's definition of a confession as an admission made at any time by a person charged with a crime stating or suggesting the inference that he had committed that crime has been adopted in *Queen Empress* v. *Nana*[1], *Emperor* v. *Cunna*[2], by Mahmood, J., in *Queen Empress* v. *Babu Lal*[3], and by Abdur Rahim and Sundara Aiyar, JJ., in *Muthu Kumaraswami Pillai* v. *Emperor*[4].

But it has not been adopted in *Queen Empress* v. *Jagrup*[5], *Emperor* v. *Santyabandu*[6], *The Empress* v. *Dabi Pershad*[7], *Barindra Kumar Ghose* v. *Emperor*[8] and *Ambar Ali* v. *Emperor*[9]. It was also not adopted by the Privy Council in an *obiter dictum* in *Pakala Narayana Swami* v. *Emperor*[10].

In the latter group of cases it was held that the Evidence Act draws a distinction between an admission and a confession of guilt and that the word, "confession" used in the sections of the Evidence Act relating to confessions must not be construed as including a mere inculpatory admission which falls short of being an admission of guilt.

This view is based on the reasoning that if confession merely means an admission by an accused then a mere inculpatory admission falling short of admission of guilt could be used under section 30 of the Evidence Act against a co-accused. In *Queen Emperor* v. *Jagrup*[5], Straight J., gives the following reasons :—

" I cannot think that this was ever intended by the Legislature. What was intended was that where a prisoner—to use a popular phrase—' makes a clean breast of it', and unreservedly confesses his own guilt, and at the same time implicates another person who is jointly tried with him for the same offence, his confession may be taken into consideration against such other person as well as against himself, because the admission of his own guilt operates as a sort of sanction which to some extent takes the place of the sanction of an oath, and so affords some guarantee that the whole statement is a true one. But where there is no full and complete admission of guilt, no such sanction or guarantee exists, and for this reason the word ' confession ' in section 30 cannot be construed as including a mere inculpatory admission which falls short of being an admission of a guilt. It must not therefore, in my opinion, be so construed in the other sections relating to confessions." In none of the other cases in which this view was adopted have

1. (1889) 14 Bom. 260.
2. (1920) 22 Bom.L.R. 1247.
3. (1884) I.L.R. 6 All. 509 at 539.
4. (1912) I.L R. 35 Mad. 397.
5. (1885) I.L.R. 7 All. 646.
6. (1909) 11 Bom.L.R. 633.
7. (1881) I.L.R. 6 Cal. 530.
8. (1909) I.L.R. 37 Cal. 467.
9. A.I.R. 1929 Cal. 539.
10. (1939) 1 M.L.J. 756 : I.L.R. 18 Pat. 234 : L.R. 66 I.A. 66 at p. 81 (P.C.).

any additional or different reasons been given. In these cases it is submitted, with great respect, that the correct principle of construction has not been followed.

The proper way of construing the meaning of a word is to find out the natural meaning after a consideration of the language used in the Act and then to see whether the natural meaning would lead to any absurd results. It is not proper to take a particular section where the word 'confession' is used and assuming that that section was never intended to be applied to a particular type of cases to proceed to assign a meaning to the word ' confession ' on the assumption that that section (*e.g.*, section 30 of the Evidence Act) was never intended to apply to a particular type of cases. In *Queen Empress* v. *Jagrup*[1], Straight, J., did observe that the word 'confession' must be construed as meaning the same in section 30 as in sections 24, 25 and 26. But instead of considering all the sections, he assigned a meaning to the word ' confession ' from a mere consideration of the wording of section 30 and held that the word ' confession ' cannot include a mere inculpatory admission not amounting to an admission of guilt. He then held that the word ' confession ' must be construed similarly in other sections relating to confessions. But if this construction is adopted in section 24 an equally absurd result might follow. For instance, an admission of a gravely or conclusively incriminating fact, *e.g.*, that an accused is the owner of and was in recent possession of the knife or revolver which caused death with no explanation of any other man's possession cannot be excluded under section 24, even if that admission was the result of a threat as described in section 24 because section 24 applies only to confessions and the above admission of an incriminating fact does not amount to a confession.

Similarly section 25 of the Evidence Act can be rendered tame in its application. An admission of a gravely or conclusively incriminating fact made to a Police Officer can be proved, if the view of Straight, J., is correct.

But even the Privy Council has adopted this view although the observations of the Privy Council are clearly *obiter*. The Privy Council has observed as follows in *Pakala Narayana Swami* v. *The King Emperor*[2].

" In view of their Lordships' decision that the alleged statement was inadmissible by reason of section 162, the appellants' contention that it was inadmissible as a confession under section 25 of the Evidence Act becomes unnecessary. As the point was argued, however, and as there seems to have been some discussion in the Indian Courts on the matter, it may be useful to state that in their Lordships' view no statement that contains self-exculpatory matter can amount to a confession, if the exculpatory statement is of some fact which if true would negative the offence alleged to be confessed. Moreover, a confession must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. An admission of a gravely incriminating fact, even a conclusively incriminating fact, is not of itself a confession, *e.g.*, an admission that the accused is the owner of and was in recent possession of the knife or revolver which caused a death with no explanation of any other man's possession. Some confusion appears to have been caused by the definition of confession in article 22 of Stephen's Digest of the Law of Evidence which defines a confession as an admission made at any time by a person charged with a crime stating or suggesting the inference that he committed that crime. If the surrounding articles are examined, it will be apparent that the learned author after dealing with admissions generally is applying himself to admissions in criminal cases, and for this purpose defines confessions so as to cover all such admissions, in order to have a general term for use in the three following articles :—confession secured by inducement, made upon oath, made under a promise of secrecy. The definition is not contained in the Evidence Act 1872 ; and in that Act it would not be consistent with the natural use of language to construe confession as a statement by an accused ' suggesting the inference that he committed ' the crime."

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1. (1885) I.L.R. 7 All. 646.
2. (1939) 1 M.L.J. 756 : I.L.R. 18 Pat. 234 : L.R. 66 I.A. 66 at 80, 81 (P.C.).

Their Lordships have not given any detailed reasons for their view that in the Evidence Act it would not be consistent with the natural use of language to construe "confession" as a statement made by an accused "suggesting the inference that he committed the crime."

Now let us see the scheme of sections 17-31 of the Evidence Act. For convenience of reference the necessary parts of the sections are reproduced below.

Admissions.

17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

18. Statement made by a party to the proceeding or by an agent to any such party . . . . are admissions. Statements made by . . . . . . are not admissions . . . . .Statements made by . . . . are admissions if they are made during. . . . .

19. Statement made by . . . . are admissions if . . . .

20. Statements made by . . . . . are admissions.

21. Admissions are relevant and may be proved . . . . . .

22. Oral admissions as to the contents of a document are not relevant unless and until . . . . . .

23. In civil cases no admission is relevant if . . . . . .

24. A confession made by an accused person is irrelevant in a criminal proceeding if . . . .

25. No confession made to a Police Officer shall be proved as against a person accused of any offence.

26. No confession made by any person whilst he is in the custody of a Police Officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

27. Provided that when any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a Police Officer so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved.

28. If such a confession as is referred to in section 24 is made after the impression caused by any such inducement, threat, or promise, has in the opinion of the Court, been fully removed, it is relevant.

29. If such a confession is otherwise relevant, it does not become irrelevant merely because it was made . . . .

30. When more persons than one are being tried jointly for the same offence and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.

31. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereinafter contained.

They are all headed "Admissions." Section 17 defines admissions. This definition is completed in sections 18-20 which explain the last clause of section 17 namely "which is made by any of the persons and under the circumstances hereinafter mentioned." Sections 18-20 may be regarded as part of section 17 and explanatory of it or as special explanatory definitions for civil matters. Sections 21-23 say when admissions are relevant and by whom they can be proved. Sections 24-30 say when confessions made by accused are irrelevant, and when they can be proved or not proved. Section 31 refers to the evidentiary effect of admissions which have been proved. Now, what is the scheme of arrangement of these sections?

If admissions by accused persons are to be distinguished from confessions by accused persons why is not this distinction defined? Why is there only one definitiion? If a distinction was intended between an admission by an accused and a confession made by an accused should we not expect a definition of confession? Does not one definition namely that of admissions show that the analytical talent of the draftsman did not visualise a distinction between admissions and confessions but admissions are classified according to the nature of the proceedings and the nature of the persons making admissions. To my mind, the scheme of sections 17-31 is as follows :—

17-20. Defining admissions.

21-22. General rules regarding the relevancy and proof of admissions, applicable both to civil matters and criminal matters (admissions made by accused).

23. Special rule for civil proceedings.

24-30. Special rules for admissions made by accused; for convenience admissions made by accused person being referred to as confessions.

31. General rule regarding the evidentiary effect of all admissions when proved.

If it was intended to distinguish between admissions and confessions in criminal matters we should expect to find a section defining the distinction and at least one section which applies only to admissions made by accused and which does not apply to confessions by accused. If a distinction was intended between admissions made by accused and confessions made by accused the natural arrangement of the sections would have been thus :

1. Defining admissions in civil matters.
2. Defining admissions made by accused.
3. Defining confessions made by accused.
4. Laying down principles applicable to 1.
5. Laying down principles applicable to 2.
6. Laying down principles applicable to 3.

Even if 1 and 2 could be combined into a general proposition, 3 would not have been combined with 1 and 2 if a distinction was intended to be drawn between admissions by accused and confessions by accused; and there should have been a similar three grouping for propositions regarding relevancy.

The real scheme of the Evidence Act appears to have only one concept of admissions and to have principles of evidence applicable (*a*) in general, (*b*) only to civil matters and (*c*) only to criminal matters.

The analysis of section 17-31 given above clearly shows that this is the scheme. For admissions in criminal matters no further sub-grouping into (*a*) admissions and (*b*) confessions is made. All admissions by accused are put in one group and given the name "confessions." With great respect I submit that the Evidence Act does not make a distinction between a confession and an admission by an accused person and that the view adopted in *Queen Empress* v. *Nana*[1], *Emperor* v. *Cunna*[2], and by two Judges in *Muthukumaraswami* v. *Emperor*[3], and one Judge in *Queen Empress* v. *Babu Lal*[4] is correct.

This view would not, I submit, lead to any absurd results even when applied to section 30 because the words used in section 30 are only "may be taken into consideration." The contrary view taken by the Privy Council in *Pakala Narayana Swami* v. *Emperor*[5], would lead to more absurd results when applied to sections 24 and 25, because Police Officers can with impunity give evidence of admissions of conclusively incrminating facts and the safeguard of sections 24 and 25 would be illusory.

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1. (1889) I.L.R. 14 Bom. 260.
2. (1920) I.L.R. 22 Bom. 1247.
3. (1912) I.L.R. 35 Mad. 397.
4. (1884) I.L.R. 6 All. 509.
5. (1939) 1 M.L.J. 756 : I.L.R. 18 Pat. 234 : L.R. 66 I.A. 66. (P.C.).

JOINT FAMILY AND INSOLVENCY

By

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Nice and interesting questions arise when the father or manager of a joint Hindu family or one of the members thereof is adjudicated an insolvent and the scope of this article is to deal with some of the questions. The answers depend upon the construction of the provisions of the Insolvency Acts bearing on the point and on the general principles relating to joint family and the nature and effect of insolvency.

It is well established that insolvency does not put an end to the joint status and does not bring about a severance in status between the insolvent and the other members of the family, *Venkatarayudu* v. *Sivaramakrishnayya*[1]. The Receiver in Insolvency whether he is called the Official Receiver or Official Assignee or Trustee in Bankruptcy merely steps into the shoes of the insolvent. The joint status continues and the Receiver is entitled to joint possession along with the other members of the family, *Official Assignee of Madras* v. *Ramachandra Aiyar*[2]. Even in the case of the insolvency of the father or manager it is only his share that vests in the Receiver and the shares of the other members do not vest in him. Whether the father's power to sell the son's share for the payment of his debts, not being illegal or immoral, and the manager's power to sell the other member's share vests in the Receiver, are points, on which, there is difference between the Preidency Towns Insolvency Act and the Provincial Insolvency Act. Under the Provincial Insolvency Act it is now settled, so far as Madras is concerned, that the power does not vest in the Official Receiver, *Rama Sastrulu* v. *Balakrishna Rao*[3], and *Virupaksha Reddi* v. *Chanalal Siva Reddi*[4] ; but the decisions of the other courts are not uniform, *Biswanath Sao* v. *The Official Receiver*[5], *Anand Prakash* v. *Narain Das*[6], and *Hari Das Himatlal* v. *Lallubai Mulchand Mehta*[7]. Under the Presidency Towns Insolvency Act, it has been held that the power also passes to the Official assignee and he can in the exercise of such power sell the son's share for the payment of the father's debts not tainted with illegality or immorality and the other member's share for debts contracted for necessity in the case of a manager, not being a father. This power does not terminate even on death (*see* S. 17 of the Provincial Insolvency Act and section 93 of the Presidency Towns Insolvency Act), *Seetharama Chettiar* v. *Official Receiver, Tanjore*[8], and *Fakirchand Motichand* v. *Motichand Hurruch Chand*[9] ; but the power can be exercised only subject to its limitations and the power subsists only so long as the family remains joint, *Sat Narain Das* v. *Sri Kishen Das*[10]. The institution of a suit for partition puts an end to the joint family status and with it the power of the manager or father, *Official Assignee of Madras* v. *Ramachandra Iyer*[11]. It is also terminated by the attachment by a creditor of the entire family properties including the sons' shares[12], *Gopala Krishnayya* v. *Gopalan*[13], *Allahabad Bank Ltd., Bareilly* v. *Bhagwan Das Johari*[14], *Indubala* v. *Bakkeswar*[15]. Though some of those cases were decided under the Provincial Insolvency Act they were decided at a time when it was held that the power vested even under that Act. The principle of these cases will thus apply to cases arising under the Presidency Act.

1. (1934) 67 M.L.J. 486 : I.L.R. 58 Mad. 126,
2. (1922) 43 M.L.J. 569: I.L.R. 46 Mad. 54.
3. (1942) 2 M.L.J. 457 : I.L.R. 1943 Mad. 83 (F.B.) (Case of Manager).
4. (1943) 2 M.L.J. 87 : I.L.R. 1944 Mad. 212 : (Case of father).
5. (1936) I.L.R. 16 Pat. 60 (F.B.).
6. (1930) I.L.R. 53 All. 239 (F.B.).
7. (1930) I.L.R. 55 Bom. 110.
8. (1926) 51 M.L.J. 269 : I.L.R. 49 Mad. 849 (F.B.).
9. (1888) I.L.R. 7 B. 438.
10. (1936) 71 M.L.J. 812 : L.R. 63 I.A. 384 : I.L.R. 17 Lah. 644 (P.C.).
11. (1928) I.L.R. 51 Mad. 417 : 55 M.L.J. 175 (F.B.).
12. (1939) 1 M.L.J. 889.
13. (1928) I.L.R. 51 Mad. 342 : 54 M.L.J. 674.
14. (1925) I.L.R. 48 All. 343
15. 41 C.W.N. 1079: A.I.R. 1937 C. 517.

The established principle of the Insolvency Law is that the trustee is bankruptcy takes the property of the bankrupt exactly as it stood in his person with all its advantages and all its burdens, *See Sheobaran Singh* v. *Kulsum-un-nissa*[1]. Apart from certain exceptional cases in which he takes by a title superior to that of the bankrupt the broad general principle is that the trustee takes the insolvent's property subject to all equities and liabilities which affected it in the insolvent's hands. Thus it was held in the above case that the trustee takes the property of the bankrupt subject to the pre-emption rights of his co-sharer. As regards the insolvent's contracts for the purchase or sale of lands or goods whatever interest therein the insolvent possesses and any liability to which he is subject therein at the time of the insolvency passes to the receiver. Thus it has been held that where in the case of a building contract it was provided that upon the default of the builder in fulfilling his part of the agreement the owner might re-enter upon the land and expel the builder and on such re-entry all moveables of the builder in and about the building shall be forfeited and become the property of the owner " as and for liquidated damages " and the builder became bankrupt before the owner seized the goods, the right of the owner to seize is not defeated by the bankruptcy of the builder before the seizure was made and that the trustee in bankruptcy takes subject to the rights of the owner under the agreement. As stated by James, L.J., in the above-case, *Ex parte Newitt. In re Garrud*[2], "the broad general principle is that the trustee in bankruptcy takes all the bankrupt's properties but takes it subject to all the liabilities which affected it in the bankrupt's hands unless the property which he takes as the legal personal representative of the bankrupt is added to by some Express provision of the bankrupt Law." In *Ex parte Holthausen*[3], it was held that the trustee is bound to perform the contract of the bankrupt in exactly the same way as he himself was bound to perform it. The principle was stated thus :—" The trustee in bankruptcy is bound by all the equities which affect a bankrupt or liquidating debtor that is to say, if a bankrupt or a liquidating debtor under circumstances which are not impeachable under any particular provision connected with his bankruptcy or insolvency enters into a contract with respect to his real estate for a valuable consideration that contract binds himself." It is worthy of note that the learned Lord Justice assimilates the position of the trustee to that of a legal personal representative and holds that even a forfeiture clause can be enforced against him. The same view is taken in *Official Assignee of Madras* v. *Ramachandra Aiyar*[4], and it is decided that the Official Assignee is not an alienee but the representative of the insolvent and as much entitled to joint possession of the insolvent's share along with the other members of the family.

Turning now to the provisions of the Insolvency Acts, we shall examine whether there are any particular provision or provisions under which the above position can be impeached. The provisions bearing on the point are contained in section 28, clauses (2), (4) and (7); section 37; section 56, clauses (1) and (3) and section 67 of the Provincial Insolvency Act and section 17; section 23; section 51; section 52 (2) (*a*); section 58 (2) and section 76 of the Presidency Towns Insolvency Act.

Section 28 (2) enacts that " on the making of an order of adjudication, the whole of the property of the insolvent shall vest in the Court or in a Receiver as hereinafter provided and shall become divisible among the creditors." (Section 17, Presidency Towns Insolvency Act.) Section 28 (4) enacts " All property which is acquired by or devolves on the insolvent after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or receiver and the provisions of sub-section (2) shall apply in respect thereof. (Section 52 (2) (*a*), Presidency Towns Insolvency Act). Section 28 (7) (section 51, Presidency Act) deals with the doctrine of relation back. Section 37 (Section 23 Presidency Act)

1. (1927) I.L.R. 49 All. 367.
2. (1881) L.R. 16 Ch. D. 522.
3. (1874) L.R. 9 Ch. A. 722.
4. (1922) 43 M.L.J. 569 : I.L.R. 46 M. 54.

provides for reverting of the property to the insolvent on annulment. Section 56, clause (1), [section 58, clause (2), Presidency Act] provides for the appointment of a receiver on adjudication and the vesting of such property in the receiver and clause (3) provides for the removal of any person in possession or custody of such property. The proviso enacts " that nothing in this section shall be deemed to authorise the court to remove from the possession or custody of property any person whom the insolvent has not a present right to remove." Section 67 (section 76) of the Presidency Act provides for the vesting of the surplus in the insolvent. There is thus nothing in these provisions which in any way impeaches or detracts from, the general proposition stated above. On the other hand the provisions contained in sections 37, 56 and 67 lend support to it; for they recognise that the Receiver stands exactly in the position of the Insolvent and he has no higher rights and that the property reverts to the insolvent on annulment and that the surplus revests in him on the termination of the insolvency.

It has next to be considered what is meant by " the property of the insolvent " which vests in the Receiver on adjudication. Is it merely the undivided, unspecified interest which the father or manager has in the joint family property or is it the share to which the father or manager would be entitled on the date of adjudication if there was a severance on that date? It has to be remembered in this connection that it is the basic principle of Hindu Law that no member of a joint family is entitled to any definite share in the joint family property; nor can he predicate at any time to what share he is entitled. The share is subject to fluctuations by births and deaths in the family and the share is defined, specified and ascertained only when a severance or partition takes place. If insolvency does not operate as a severance, as has been uniformly held, how can it be contended that on insolvency the share of the insolvent is defined or specified? If the correct view is, as has been held, that the Receiver takes on adjudication only the undivided interest of the insolvent in the joint family property with all its advantages and disadvantages until a partition is effected, strictly and logically, even an alienee from him will acquire no right in the property but merely an equity to work out his rights in a suit for partition, as in case of an alienee from a coparcener, at any rate, in cases falling under the Mitakshara Law, see *Nanjaya Mudali* v. *Shanmuka Mudali*[1] and *Dada Sahib* v. *Mahomed Sultan Sahib*[2]. It has been held that the alienee from a coparcener will be entitled only to the share to which the alienor was entitled on the date of the alienation, that he is not entitled to any increase or subject to any decrease in such share by subsequent births and deaths. *Ramachandran Pillai* v. *Kalimuthu Chetti*[3] and *Vasireddi Balachandrasekhara Varaprasad* v. *Lakshminarasimham*[4]. He is not also entitled to claim joint possession or mesne profits from the date of purchase, *Maharaja of Bobbili* v. *Venkataramanjulu Naidu*[5] and *Kandaswami Udayan* v. *Velayutha Udayan*[6].

What then is the position of the Receiver in Insolvency? Is he a representative of the insolvent taking the property of the insolvent with all its advantages and disadvantages or is he an alienee? By the term ' alienee " I mean only alienee for consideration; for in Hindu Law no member has got a power to make a gift barring an exception in the case of the head of the family with which we are not at present concerned. If he is merely a representative of the insolvent and steps into his shoes and takes the property exactly as it stood in his hands with all the benefits and burdens, then it is difficult to understand how the property in his hands will not be subject to the same fluctuation as in the hands of the insolvent,

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1. (1911) 26 M.L.J. 576 : I.L.R. 38 Mad. 684.
2. (1920) 39 M.L.J. 706 : I.L.R. 44 Mad. 167.
3. (1911) 21 M.L.J. 246 : I.L.R. 35 Mad. 47 (F.B.).
4. (1940) 1 M.L.J. 820 : I.L.R. 1940 Mad. 913.
5. (1914) 27 M.L.J. 409 : I.L.R. 39 Mad. 265.
6. (1926) 51 M.L.J. 99 : I.L.R. 50 Mad. 320.

unless it be that some other principle of law crystallises the share of the insolvent as on the date of adjudication.

Suppose, when the father was adjudicated insolvent he had three sons, one of whom died during the pendency of the insolvency proceedings and subsequently two sons were born to the insolvent, what is the position ? Does the Receiver get the increase caused by the death of the two members ? The logical result of the principle that insolvency does not affect the status, and without invoking any other provision of the statute, will be that he is entitled to the benefit. Then what happens when two more sons are born ? Is the share *pro tanto* reduced ? Applying the same principles and apart from other considerations it will follow that the share will get also reduced.

It has however been held that the share of the insolvent gets crystallised as on the date of adjudication and that it is not subject to decrease by the addition to the coparcenary by subsequent births, see *Kuppuswami Naidu* v. *Krishnama Naicken*[1] and *Hanumantha Gowd* v. *Official Receiver, Bellary*[2]. In *Kuppuswami Naidu* v. *Krishnama Naicken*[1] the father was adjudicated and subsequently two sons were born to him. They filed a suit for partition impleading the Official Receiver and got an *ex parte* decree. The Official Receiver then filed an application for setting aside that *ex parte* decree which was dismissed. The creditors then filed a suit to have it declared that the decree was not binding on the estate as the Receiver was guilty of gross neglect. The suit was decreed ultimately by the High Court on the ground that as the sons were not even conceived on the date of adjudication they " could have no reasonable claim to a share in their father's property." The judgment relating to the question is very short and there is no discussion of the principles involved or reference to any decided cases. In fact, it looks as though there was no dispute about the point. In *Hanumantha Gowd* v. *Official Receiver, Bellary*[2], the question directly arose whether the receiver is entitled to the benefit of the increase in the share caused by the death of one of the members of the family. It was held that the benefit of the increase will accrue to the Official Receiver. It was observed that he was entitled to such increase, not because the Official Receiver is a coparcener in Hindu Law, but because by the operation of section 28 (4) of the Provincial Insolvency Act he is entitled to all property which is acquired by or devolves on the insolvent and their Lordships further held that the expression ' devolves on " includes also devolution by survivorship. They then deal with an argument advanced by counsel based on decrease by subsequent births and it is remarked in that connection that the Official Receiver does not lose that which was vested in him because the vesting amounts to an alienation which crystallises the share of the insolvent to which the alienee is entitled as on the date of adjudication. This conception of treating the Official Receiver as an alienee is not quite in consonance with the well established position that he is merely the representative of the insolvent and stands in his shoes. It has been pointed out in several cases that the Receiver is not in the position of an alienee and that the vesting on adjudication does not amount to an alienation. It has further been held that though he is a stranger, he is entitled to joint possession along with the other coparceners unlike alienees because he is not an alienee but a representative of an insolvent. If he is in the position of an ordinary alienee he will not strictly be entitled to any interest in the property but will merely have an equity to work out his share by means of a suit for partition, see *Srinivasa Aiyangar* v. *Cunniappa Chetty*[3] and *Subbe Goundan* v. *Krishnamachari*[4].

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1. (1935) 70 M.L.J. 90 : I.L.R. 59 Mad. 770.
2. (1946) 1 M.L.J. 247.
3. (1914) 26 M.L.J. 567 : I.L.R. 38 Mad 684.
4. (1921) 42 M.L.J. 372 : I.L.R. 45 M. 449.

It may be noticed here that even in cases falling under the Provincial Insolvency Act, there is a conflict of decisions amongst the various High Courts as to whether the after-acquired property vests immediately without any intervention by the Receiver or as to whether the principle of *Cohen* v. *Mitchell*[1], applies also to cases arising under the said Act, see *Ma Phaw* v. *Maung Ba Thaw*[2], *Nagindas Bhukandas* v. *Ghelabai Ghulabdas*[3], *Jagdish Narain Singh* v. *Musammat Ramsakal Kuer*[4] and *Kamal Lal Gurda* v. *Chandrika Charan Ray*[5].

Turning now to the provisions of the Presidency Towns Insolvency Act there are no words in that Act corresponding to " shall forthwith vest " which are found in section 28 (4) of the Provincial Insolvency Act and it has been uniformly held that after-acquired property is the property of the insolvent which he is entitled to deal with so as to pass complete title to the alienee unless and until the Official Assignee intervenes, following the principle embodied in *Cohen* v. *Mitchell*[1]. Consequently, the benefit of any subsequent increase in the share of the insolvent by the subsequent death of a coparcener will not automatically accrue to the Assignee and he will be entitled to deal with it as he pleases. If however the Assignee is treated as the representative of the insolvent and as standing in his shoes, it will vest automatically on acquisition or devolution.

There is one other aspect of the matter which may be considered in this connection. What is the effect of annulment or termination on the property in the hands of the receiver? Both under the Presidency Towns Insolvency Act and the Provincial Insolvency Act the property remaining undisposed of will on annulment revert to the debtor in the absence of an order by the Court continuing the administration by a person in whom the property is to vest. It is also clear that the surplus if any, remaining in the hands of the Receiver after the termination of the insolvency will revest in the insolvent. The question then arises as to the nature and character of the property when it reverts or revests. Does the debtor take it as joint family property or as separate property? The effect of the termination of the insolvency by annulment or otherwise is to remit the debtor to his original position at the moment of adjudication as if there had been no insolvency and therefore, as at the moment of adjudication the debtor was a member of the joint family, the property goes back to him as joint family property. In other words, the nature and character of the property does not undergo any change by reason of adjudication and the insolvent or debtor gets back the property as joint family property. The observations of Cockburn, C.J., with reference to the corresponding provision of the English Bankruptcy Act in *Bailee* v. *Johnson*[6] are in point. " The effect of section 81 of the present Act is, subject to any *bona fide* disposition lawfully made by the trustee prior to annulling of the bankruptcy and subject to any condition which the Court annulling the bankruptcy may by its order impose, to remit the party whose bankruptcy is set aside to his original situation." To the same effect are the following observations of Kelly, C.B., in *Bailee* v. *Johnson*[7]. " The only sensible meaning which can be attached to the word ' revert ' is that what was apparently the property of the trustee at the time of the annulling of the bankruptcy shall thereupon become the property of the person whose bankruptcy has been annulled, *as if it had always been his*." (The italic is mine) The observations are made in a case where the adjudication ought not to have been made but the same principle will apply to other cases also.

In *Lakshmana Chettiar* v. *Srinivasa Aiyangar*[8], it was held by a single judge that " under section 37 of the Provincial Insolvency Act it reverts to the debtor as his

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1. (1890) 25 Q.B.D. 262.
2. (1926) I.L.R. 4 Rang. 125.
3. (1919) I.L.R. 44 Bom. 673.
4. (1928) I.L.R. 8 Pat. 478.
A I.R. 1939 Pat. 18.
6. (1871) L.R. 6 Ex. Cases 263.
7. *Ibid.*, 279.
8. (1937) 71 M.L.J. 707 : I.L.R. 1937 Mad. 203.

property, that is, as his individual property so that, if on the date of the reversion, he is not alive, it will go to his heir under the "Hindu law"; and in this case the widow, the 4th defendant. The property thus being not joint family property defendants 1 to 3 have not taken it by survivorship." The reasoning was "Once the effect of insolvency is to divest the share of insolvent of its character as joint family property, it cannot regain that character when it comes back to the insolvent on annulment, unless he can by an unequivocal act of his own impress it with the said character." The basis of the said decision, that the effect of insolvency is to divest the share of the insolvent of its character as joint family property is not correct and is opposed to accepted principles and the decision was overruled in *Suryanarayanamurthi* v. *Veerraju*[1] by a Bench. The said decision lays down that the property in the hands of the receiver on annulment under section 37 of the Provincial Insolvency Act reverts to the debtor as joint family property and not as separate property. It has since been referred to with approval and followed in *Hanumantha Gowd* v. *Official Receiver, Bellary*[2].

In *Suryanarayanamurthy* v. *Veerraju*[1], a father and son constituted a joint Hindu family when the father was adjudicated an insolvent. Subsequent to the adjudication another son was born to him. Some of the properties were realised and dividends distributed. Thereafter the adjudication was annulled. A suit for partition was then brought by the first son and the question arose as to the nature of the property taken by the father on annulment and as to the share of the plaintiff and his brother. The learned Judges hold that the property reverts as joint family property and that the father and sons "will each be entitled to a third share in the family properties including those got back from the Official Receiver." Referring to the case in *Lakshmana Chettiar* v. *Srinivasa Iyengar*[3], they observe: "It is not in our opinion correct to say that an insolvent coparcener's share ceases to be joint family property while it is vested in the Official Assignee merely because the other coparceners lose their right of survivorship in the share or because it is not divested from the Official Assignee on the insolvent's death."

Suppose there is a disruption of the joint status during the pendency of the insolvency proceedings by the institution of a suit for partition or otherwise, will it make any change in the nature or character of the property that will come back to the debtor on termination of the insolvency. Once there has been a severance it will cease to be family property and consequently when it reverts or revests, it will revert or revest as separate property and not as joint family property. The observation in *Suryanarayanamurthi* v. *Veerraju*[1] that "the division in status cannot affect the partible character of the property when it comes back to him and he must hold it as a divisible family asset" must be read with reference to the particular facts of the case, *viz.*, that the point arose for decision in a suit for partition instituted pending the insolvency and that the rights of parties had to be determined as on the date of the institution of the suit when it was joint family property. Otherwise it will be difficult to reconcile it with the decision of the Privy Council in *Sat Narain Das* v. *Sri Kishan Das*,[4] or the decision of the Full Bench of the Madras High Court in *Official Assignee of Madras* v. *Ramachandra Iyer*[5].

If however, the vesting on adjudication amounts to alienation and the share of the insolvent gets crystallised as on that date, it is difficult to understand how the property will revert or revest as joint family property. The share will get crystallised on that date either on the footing that the Receiver is treated as an alienee or assignee, of course statutory, or on the footing that there has been ascertainment or definition of the insolvent's share as on that date. Treated as an

1. (1945) 1 M.L.J. 292 : I.L.R. 1946 Mad. 54.
2. (1946) 1 M.L.J. 247.
3. (1936) 71 M.L.J. 707 : I.L.R. 1937 Mad. 203.
4. (1936) 71 M.L.J. 812 : L.R. 63 I.A. 384 : I.L.R. 17 Lah. 644 (P.C.).
5. (1928) 55 M.L.J. 175 : I.L.R. 51 Mad. 417 (F.B.).

alienation, the alienee will be entitled to the share as on the date of alienation and so far as that share is concerned it gets ascertained and separated from the rest. If there has been ascertainment and definition even then that share gets separated from the rest. In either view it will be difficult to hold that it continues to be joint family property when it reverts or revests.

What then is the position of the after-born son if the property comes back as joint family property? Are his rights taken away once for all on adjudication or are his rights merely suspended during the insolvency? If the right is extinguished on adjudication can it revive on annulment or termination? These are some of the questions which may arise for consideration. The correct view is that his rights are merely suspended and that if the property comes back as joint family property, it may be the same property as originally vested in the Receiver together with its accretion or substitute, then certainly the son is entitled to a share in it.

The next question is what is the quantum of share to which he is entitled - Is it the quantum to which he would be entitled as on the date of adjudication or of his conception or is it limited to his interest in the properties as they stand when they come back? The point seems to be bare of authority. There is however an observation in *Suryanarayanamurthi* v. *Veerraju*[1], that when the property reverts on annulment, the father and the sons, one of whom was born subsequent to adjudication " will each be entitled to a third share in the family properties." If thereby it is meant a third share of the properties then in existence, irrespective of what was disposed of by the Receiver, then it will be neither fair nor reasonable. It is not possible to find out from the judgment whether the dispositions by the Receiver were taken into account or not. The correct and equitable view seems to be to treat the properties disposed of by the Receiver as having been alienated by the insolvent and to divide and allot the remaining properties on that footing. That is to say, the properties disposed of will be allotted to the share of the insolvent and if he is still entitled to anything more he will be allowed to share in the other properties, and to the extent necessary to make up that share; otherwise they will be divided amongst the other coparceners in accordance with their shares.

One other point may be considered in this connection. Suppose a son is born before the date of adjudication but after the presentation of the insolvency petition, what is his position? Is he in a better position than a son born or conceived after adjudication? Here the doctrine of relation back may come into play and operate to vest the property in the Receiver as and from the date of presentation of the petition or as and from the date of the act of insolvency according as the matter falls to be decided under the Provincial or Presidency Insolvency Act and he will not be in a better position than if he was born or conceived after adjudication. The point is covered by a decision of a single Judge of the Madras High Court reported in *Official Receiver, High Court, Madras*, v. *Rao & Co.*[2]

In conclusion, considering all the aspects, the true principle is to treat the Receiver as a representative of the insolvent and to treat the vesting on adjudication as a statutory assignment or conveyance for the limited purpose of paying off the creditors of the insolvent. In other words, " the trustee takes all the bankrupt's property, not for an absolute estate in Law, but for limited purposes only, *viz.*, for the payment of creditors under the bankruptcy and that bankruptcy only. Subject to that, he is a trustee for the surplus " The Receiver will thus be entitled to deal with the property for the purpose of paying off the debts and the property in his hands will not be affected by any subsequent infirmities to which it may be subject in the hands of the insolvent until the object of the trust is carried out, as for instance, where the share is liable to diminution by subsequent births in the family. He will be entitled to the increase in the share by subsequent deaths

1. (1945) 1 M.L.J. 292 : I.L.R. 1946 Mad. 2. (1947) 1 M.L.J. 242.

in the family as the representative of the insolvent and without the necessity for intervention. In the above view, the principle of reverter or revesting also can be explained. If anything remains after the object of the trust is carried out there will be a resulting trust in favour of the author of the trust.

SUMMARY OF ENGLISH CASES.

B. JELIC *v.* CO-OPERATIVE PRESS, LTD., (1947) 2 All.E.R. 767 (C.A.).

Practice—Security for costs against plaintiff residing "ordinarily out of jurisdiction"—Test—R. S. C., O. 65, R. 6-A.

The plaintiff in a suit for libel was a native of Yugo-Slavia and early during the recent war was brought to England and was there for 2 years. There was no evidence that he was likely to go abroad.

Held, it cannot be said that the plaintiff was residing ordinarily out of jurisdiction within the meaning of R. S. C., O. 65, rule 6-A and make him liable to furnish security for costs.

Re LUCAS, (1947) 2 All.E.R. 773 (Ch.D.).

Will—Gift to institution which had ceased to exist during testator's lifetime—Gift lapses.

Where a bequest is made for the upkeep a particular institution which had ceased to exist during the lifetime of the testator it cannot be applied *cypres* but must fall into the residue and be treated as undisposed of.

MCCULLOCH *v.* LEWIS A. MAY (PRODUCE DISTRIBUTORS), LTD., (1947) 2 All. E.R. 845 (Ch.D.).

Trade Name—Passing off—Broadcaster using fancy name, "Uncle Mac", in Children's programmes—Defendant using "Uncle Mac's Puffed Wheat" as children's food—If infringement.

A radio artist giving children's programmes under the fancy name "Uncle Mac" cannot claim an injunction to restrain a manufacturer marketing a food product under the name "Uncle Mac's Puffed Wheat" as the plaintiff was not engaged in that class of business.

BAXTER *v.* BAXTER, (1947) 2 All.E.R. 886 (H.L.).

Divorce—Insistence by wife on husband using contraceptive—If refusal to consummate entitling the husband to a decree of nullity.

The use of contraceptives did not prevent the consummation of the marriage and a husband is not entitled to a decree of nullity of marriage on the ground of the wife's insisting on the use of contraceptives by the husband.

(1945) 2 All.E.R. 197, overruled; (1946) 2 All.E.R. 760, not approved; (1947) 1 All.E.R. 387, affirmed.